STATE OF MICHIGAN

COURT OF APPEALS

MARK O'KEEFE,

Plaintiff/Counterdefendant-Appellant,

v

DONALD L. GUNDLE, LAWRENCE M. LEMIEUR, CALVIN M. STEIN, and THOMAS J. WALLER,

Defendants/Counterplaintiffs-Appellees,

and

CROSSMARK, INC.,

Defendant-Appellee.

UNPUBLISHED
October 30, 2003

No. 240233
Wayne Circuit Court
LC No. 00-004390-CB

MARK O'KEEFE,

Plaintiff/Counterdefendant-Appellee,

v

MARIE J. GUNDLE, Personal Representative for the Estate of DONALD J. GUNDLE, Deceased, LAWRENCE M. LEMIEUR, CALVIN M. STEIN, and THOMAS J. WALLER,

Defendants/Counterplaintiffs-Appellants,

and

CROSSMARK, INC.,

Defendant.

No. 242022
Wayne Circuit Court
LC No. 00-004390-CB

Before: Owens, P.J., and Griffin and Schuette, JJ.

PER CURIAM.

This suit is based on allegations that the individual defendants[1] breached their contractual obligations to plaintiff. In Docket No. 240233, plaintiff appeals various rulings of the trial court limiting damages, as against Crossmark, to only fifty shares of stock, and to the difference in value of those shares of stock from the time that plaintiff sold those shares to Pfeister Corporation (Pfeister), and the time Pfeister traded those shares of stock to Crossmark. We affirm in Docket No. 240233. In Docket No. 242022[2], the individual defendants appeal the trial court's ruling denying case evaluation sanctions pursuant to MCR 2.403(O). We reverse.

I

The relevant facts surrounding this case are not in dispute. Plaintiff came to work for Pfeister sometime after November 1986 as a controller, ultimately receiving the title of senior vice president and becoming one of Pfeister's directors. Because of his position, plaintiff became eligible to purchase Pfeister stock. It is uncontroverted that plaintiff purchased fifty shares of stock in September 1991, and an additional fifty shares in 1994.

The terms associated with the sale of stock are set forth in Pfeister's Shareholders and Redemption Agreement (Shareholders Agreement). Section 3.2 of the Shareholders Agreement sets out, in pertinent part, that:

> Upon the termination of any Shareholder's employment with the Corporation for any reason, whether at the Shareholder's option or at the Corporation's option, with or without cause, such Shareholder hereby agrees to sell, and the Corporation hereby agrees to purchase, all Shares owned by the Shareholder at that time at the Purchase Price set forth in Article V of this Agreement and on the payment terms set forth in Section 3.6 of this Agreement. The Shareholder will be deemed to have offered the Shares to the Corporation on the date of such termination of employment.

Section 3.7 of the Shareholders Agreement provides that a shareholder selling shares to Pfeister may also be entitled to "Subsequent Sale Proceeds." Section 1.13 of the Shareholders Agreement defines "Subsequent Sale Proceeds" as:

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[1] Because the individual defendants, as the former shareholders of Pfeister, share the same legal position, we will refer to them, collectively, as defendants. Because Crossmark has a different legal position, we will refer to it as Crossmark.

[2] These appeals were consolidated pursuant to MCR 7.211(E)(2). *O'Keefe v Gundle*, unpublished order of the Court of Appeals, issued August 1, 2002 (Docket Nos 240233 and 242322).

> . . . an amount equal to a Selling Shareholder's Shareholder's Percentage of any consideration received by the Corporation or the shareholders of the Corporation upon any disposition of substantially all of the assets or stock of the Corporation (a "Disposition"), which Disposition occurs within three (3) years of the Closing Date applicable to the sale of the Selling Shareholder's Shares to the Corporation pursuant to this Agreement, less the amount of the purchase Price (as defined in Article V below), excluding therefrom any portion of the Purchase Price constituting the Seller's Percentage of Subsequent Sale Proceeds, received, or to be received, by the Selling Shareholder on account of the sale of his shares to the Corporation pursuant to this Agreement.

Read together, these provisions provide that if a shareholder leaves, the corporation must buy his stock at the price as calculated in Article V. If the corporation undergoes a "disposition" within three years of that stock sale, the corporation may have to adjust the price of the stock to account for the increased value of the stock at the time of the disposition.

Plaintiff resigned in late December 1994, and his last day worked at Pfeister was January 9, 1995. Pursuant to the Shareholders Agreement, plaintiff offered his stock to Pfeister for repurchase. Apparently for tax purposes, plaintiff sold his shares back at two different times: the first sale for fifty shares occurred on December 27, 1994, and the second sale for the remaining fifty shares took place on January 24, 1995. Plaintiff calculated the price per share of his stock at $978.86, which meant that plaintiff received a cash payment of $39,104.[3]

Approximately three years after plaintiff sold his shares to Pfeister, the corporation merged with Crossmark. According to defendants, the value of Pfeister's stock at the time of the merger was $1,154.11 per share. In addition to the purchase of defendants' shares of stock in Pfeister, Crossmark provided additional "compensation," such as Wage Continuation Agreements (WCA's), long-term incentive plans (LTIP's), and non-compete agreements for those Pfeister directors that stayed to work for Crossmark. Although Crossmark swapped defendants' stock in Pfeister for its stock, Crossmark did not purchase all of Pfeister's assets. Because Crossmark did not want certain real estate owned by Pfeister, defendants formed a company to purchase it. Plaintiff believed that he was entitled to a portion of the money paid by Crossmark as subsequent sale proceeds; plaintiff disputed that all of the compensation paid by Crossmark at the time of merger had been considered when defendants calculated the price per share at $1,154.11; plaintiff believed he was entitled to consideration of the value of the real estate, as well as a portion of the WCA's, LTIP's, and any other compensation offered by Crossmark to defendants. This suit followed.[4]

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[3] The record reflects that, for various reasons, plaintiff was only entitled to a percentage of the proceeds. This issue is unimportant for this appeal.

[4] Defendants counterclaimed in this case. However, defendants' claims were voluntarily dismissed by the trial court's May 19, 2000, order, and they are not at issue here.

The trial court determined that defendants were entitled to summary disposition in their favor on the fifty shares of stock that plaintiff sold to Pfeister in 1994. The trial court ruled that those shares of stock were sold outside the three-year period of Section 1.13 of the Shareholders Agreement, as there was no genuine issue of material fact that the merger date was December 31, 1997. Later, the trial court dismissed Crossmark from the litigation on Crossmark's stipulation that it would follow any order the trial court would enter on the issue of damages. Finally, the trial court dismissed the individual defendants, and ruled that, as a matter of law, damages would be measured as the difference in the value of the fifty shares of stock at the time plaintiff sold those shares to Pfeister and the time that Pfeister exchanged those shares with Crossmark.

II

Docket No. 240233

On appeal, plaintiff argues that the trial court erred when it granted summary disposition on his claims on the first fifty shares of stock. A motion for summary disposition under MCR 2.116(C)(10), which tests the factual support of a claim, is subject to de novo review. *Smith v Globe Life Ins Co*, 460 Mich 446, 454; 597 NW2d 28 (1999).

The trial court's review of a motion under this rule is as follows:

> In reviewing a motion for summary disposition brought under MCR 2.116(C)(10), a trial court considers affidavits, pleadings, depositions, admissions, and documentary evidence filed in the action or submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion. A trial court may grant a motion for summary disposition under MCR 2.116(C)(10) if the affidavits or other documentary evidence show that there is no genuine issue in respect to any material fact, and the moving party is entitled to judgment as a matter of law. MCR 2.116(C)(10), (G)(4).
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> In presenting a motion for summary disposition, the moving party has the initial burden of supporting its position by affidavits, depositions, admissions, or other documentary evidence. The burden then shifts to the opposing party to establish that a genuine issue of disputed fact exists. Where the burden of proof at trial on a dispositive issue rests on a nonmoving party, the nonmoving party may not rely on mere allegations or denials in pleadings, but must go beyond the pleadings to set forth specific facts showing that a genuine issue of material fact exists. If the opposing party fails to present documentary evidence establishing the existence of a material factual dispute, the motion is properly granted. [*Quinto v Cross & Peters Co*, 451 Mich 358, 362-363; 547 NW2d 314 (1996) (citations omitted).]

Although he appears to agree with the trial court's reasoning that he can only recover the subsequent sale proceeds for stock sold to Pfeister within three years of a "disposition," plaintiff argues that a genuine issue of material fact exists on the issue of the date of Pfeister's merger with Crossmark. We disagree.

Defendants offered a state of Texas document that reads:

> **I, Elton Bomer**, Secretary of State of Texas, DO HEREBY CERTIFY that Articles of Merger of **AMERICAN MANAGEMENT GROUP, INC.,** a **DELAWARE** corporation, and **GORDON-MURDOCK, INC.,** a **TEXAS** corporation, were filed in this office on **DECEMBER 31, 1997**, for which a certificate of merger was issued; and that according to the terms of the merger the surviving corporation is **AMERICAN MANAGEMENT GROUP, INC.**, a **DELAWARE** corporation.

Defendants argue that this document evidences the merger date between Crossmark and Pfeister. Defendants also offered the deposition testimony of defendant Lemieur that the merger occurred at the close of business on December 31, 1997.

Plaintiff posits that the document from the state of Texas does not serve as documentary evidence of the date of merger. Plaintiff contends that there is no reference to either Pfeister or Crossmark anywhere in this document. Plaintiff is, arguably, correct. The document does not specifically identify Pfeister and Crossmark. The relationship of American Management Group and Gordon-Murdock, Inc., to the parties to this suit is not explained. Moreover, defendants in their brief on appeal do not offer any explanation for the different names on the certificate. However, even assuming that the certificate is not suitable evidence of the date of merger, plaintiff still fails to offer sufficient documentary evidence to refute Lemieur's deposition.

Plaintiff's only attempt to refute Lemieur's testimony comes in the form of a letter from David Baxley of the American Management Group to defendants. Although the letter includes many handwritten comments and deletions, the letter states:

> *The parties to the Reorganization Agreement and this Letter Agreement hereby agree that, notwithstanding the provisions of Section 2.1.A of the Reorganization Agreement or the date on which the Articles of Merger are actually filed of record in Texas and Michigan, the effective date of the Merger shall be effective as of the close of business December 31, 1997.* The parties hereto further agree as follows: (i) The effective dates of all stock-related agreements contemplated under the Reorganization Agreement, including without limitation , the share exchange, Voting Trust Agreements, Joinder Agreements to the AMG Voting and Stock Transfer Agreement, and Joinder Agreements to the AMG Non-Voting Stock Restriction Agreement, likewise shall be effective as of the close of business December 31, 1997; and (ii) The other agreements entered into in connection with the reorganization agreement, including without limitation, the Employment Agreements, Wage Continuation Agreements, and LTIP Award Certificates, with effective dates of November 1, 1997, were performed in accordance with the terms of such agreements through December 31, 1997; and notwithstanding the extension of the effective dates of the Merger, the provisions and the term of such agreements shall remain as stated in such agreements (i.e. shall not be modified or extended by this Letter Agreement, by implication or otherwise). [Emphasis added.]

Plaintiff contends that because the document identified the "effective dates" of November 1, 1997, this letter creates a genuine issue of material fact. We disagree. The letter, by its terms, identifies the effective date of the merger as December 31, 1997. The November 1, 1997, date

clearly relates to the effective date of the other agreements. It is the merger that constitutes the "disposition" contemplated in section 1.13 of the Shareholder's Agreement quoted on page five of this report. Because plaintiff failed to satisfy his burden to offer documentary evidence to create a genuine issue of material fact as to the date of the merger, we affirm the trial court's grant of summary disposition as it relates to the sale of fifty shares of stock sold before December 31, 1994.

Plaintiff also takes issue with the trial court's ruling on the issue of damages.

> . . . the main goal in the interpretation of contracts is to honor the intent of the parties. The Court must look for the intent of the parties in the words used in the contract itself. When contract language is clear, unambiguous, and has a definite meaning, courts do not have the ability to write a different contract for the parties, or to consider extrinsic testimony to determine the parties' intent. [*Mahnick v Bell Co*, 256 Mich App 154, 158-159; 662 NW2d 830 (2003) (citations omitted).]

"Damages recoverable for breach of contract are those that arise naturally from the breach or those that were in the contemplation of the parties at the time the contract was made." *Farm Credit Services of Michigan's Heartland, PCA v Weldon*, 232 Mich App 662, 678-679; 591 NW2d 438 (1998).

Here, the Shareholders Agreement provides that a shareholder may be entitled to subsequent sale proceeds, or "an amount equal to a Selling Shareholder's Shareholder's Percentage of any consideration received by the Corporation or the shareholders of the Corporation upon any disposition of substantially all of the assets or the stock of the Corporation (a 'Disposition')." Plaintiff argues that the letter written by Baxley to defendants, set out above, establishes that the various incentives offered to defendants were part of the consideration offered for the corporation. Because defendants received this consideration, plaintiff argues, he should receive a percentage of the consideration for those agreements.

This argument is flawed. The bonuses to which plaintiff refers ─ the WCA's, the LTIP's, etc., ─ are directed at the continued employment of defendants with Crossmark. The bonuses are not, therefore, consideration for Pfeister's disposition. Instead, defendants were merely promised the bonuses at the time of the disposition of Pfeister. The receipt of these bonuses was contingent on defendants' employment with Crossmark. This view of the transaction is supported by the deposition testimony of David Baxley, whom the parties represent is an employee of Crossmark. From this testimony, it is clear that the only consideration given to defendants at the time of the merger with Crossmark was the shares of stock, and the promises for bonuses should each individual defendant work for Crossmark. Plaintiff offers nothing to refute this. Because there is no doubt that plaintiff was not entitled to any monetary amount as a result of the employment bonuses because he never went to work for Crossmark, plaintiff fails to show any error with the trial court's determination as to how damages were to be calculated.

Next, plaintiff appeals the trial court's ruling limiting liability only to Crossmark, as successor to Pfeister. Plaintiff argues that defendants should be personally liable to him for failing to pay the subsequent sale proceeds. Plaintiff's argument is that the plain language of the Shareholders Agreement allows for the shareholders to be held individually liable for the

subsequent sale proceeds. Plaintiff directs this Court to two provisions within the Shareholders Agreement in support of this assertion. First, plaintiff directs this Court to section 1.13 and section 3.7 of the Shareholders Agreement. However, neither of these provisions addresses whether defendants can be held individually liable for subsequent sale proceeds. Rather, section 1.13 defines what subsequent sale proceeds are, and section 3.7 outlines how they are paid, but neither specifically states who is obligated to pay them. Plaintiff offers nothing else for support that defendants are individually liable. A reading of section 3.2, which obligates a shareholder who is terminated to sell his shares to Pfeister, shows that an agreement between the shareholder and Pfeister could only obligate Pfeister to pay subsequent sale proceeds. After all, the Shareholders Agreement serves as an agreement between the shareholders and the corporation and not between the shareholders individually. One of the fundamental precepts in corporate law is that corporations are legally distinct from their shareholders. See *Dep't of Consumer & Industry Services v Shah,* 236 Mich App 381, 393; 600 NW2d 406 (1999). Plaintiff fails to offer anything to refute this conclusion or to "pierce the corporate veil." *Shah, supra.*

Instead, plaintiff's arguments appear to be two-fold. First, plaintiff argues that the trial court essentially reversed itself in ruling that defendants could not be found liable. Plaintiff directs this Court to a portion of the December 8, 2000, hearing transcript, in which the trial court appeared to reject defendants' argument that they should not be held individually liable. However, the trial court ultimately ruled to limit liability to just Crossmark. Assuming plaintiff is correct that the trial court overruled itself, plaintiff fails to show how this decision, in and of itself, was wrong. In order to succeed on appeal, plaintiff would have to show that the trial court ultimately came to the wrong legal conclusion. Plaintiff's second argument – that it only makes sense that defendants be found individually liable – is similarly without merit. It is true that the "corporate law concept of successor liability provides that a corporation that merely purchases the assets of another corporation is not generally responsible for the liabilities of the selling corporation." *Jeffrey v Rapid Amer Corp,* 448 Mich 178, 189; 529 NW2d 644 (1995). However, in this case, the transaction was not a sale of assets, but instead was a merger. "When two or more corporations merge, the surviving corporation generally succeeds to all the liabilities of the constituent corporations." *Id.* at 190, citing MCL 450.1724(1)(d). Here, Crossmark assumed Pfeister's liability to pay plaintiff his percentage of the Subsequent Sale Proceeds, which follows the trial court's ruling. Because plaintiff shows no error with the trial court's decision precluding plaintiff's recovery as against defendants individually, no error requiring reversal has occurred.

Plaintiff argues that the trial court erred in dismissing Crossmark from this suit. Plaintiff's argument on appeal is based on either a misapprehension or a misrepresentation of the trial court's ruling. Crossmark moved for summary disposition arguing, among other things, that, under the Shareholders Agreement, it could only be found liable to plaintiff for his percentage of the subsequent sale proceeds. Crossmark argued that, because of this provision, it should not be a party to any trial that may occur on the issue of extent of liability; Crossmark asserted that it could not be found liable for additional damages, or any amount beyond what it would be obligated to pay defendants directly. At the hearing on this issue, Crossmark succinctly stated: "Crossmark's responsibility would only be to reallocate what's being paid to the individual defendants and take some of that and give it to Mr. O'Keefe, not pay additional money for the value of the company." The following colloquy occurred between Ms. Hill, Crossmark's counsel, and the trial court:

> *Ms. Hill*: I think there's, people are making a dispute right here where there's not one. We've not taken the position that Crossmark isn't a successor in interest by merger for [Pfeister] in connection with the agreements. The position we've taken is that Crossmark as the successor to [Pfeister] is not responsible for any independent damages over and above what the individual defendants are already getting and it would be reallocated in the event [plaintiff] gets a judgment.
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> *The Court*: Well should you be at the trial or not?
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> *Ms. Hill:* I don't see any issue for us to be at the trial about [sic]. Crossmark has agreed and will continue to agree and stipulate to a judgment that if [plaintiff] gets a judgment[,] it will reallocate as the Court directs whatever [plaintiff] is supposed to get from the pot that's presently being paid to the four other defendants.

On appeal, plaintiff contends that the trial court's decision to dismiss Crossmark from the suit amounted to error. However, the trial court merely accepted Crossmark's argument that because it could only be found liable for a percentage of the money that was being paid to defendants and because it agreed that it would reallocate to plaintiff the amount of the judgment that would otherwise be paid to defendants, there was no reason for Crossmark to be involved in a trial. In that sense, the trial court did not dismiss Crossmark from any liability, it just accepted Crossmark's assertion that it had no real stake in the dispute. Accordingly, plaintiff's assertion that the trial court erred when it dismissed Crossmark from any liability is without merit.

Finally, plaintiff argues that the trial court abused its discretion when it denied plaintiff's motion for a rehearing or reconsideration. According to MCR 2.119(F)(3):

> Generally, and without restricting the discretion of the court, a motion for rehearing or reconsideration which merely presents the same issues ruled on by the court, either expressly or by reasonable implication, will not be granted. The moving party must demonstrate a palpable error by which the court and the parties have been misled and show that a different disposition of the motion must result from correction of the error.

Here, plaintiff merely presents the same issues addressed above. However, as shown, the trial court's rulings were not erroneous. In the absence of palpable error, the trial court's denial of plaintiff's petition for rehearing or reconsideration was not an abuse of discretion. We affirm the trial court's rulings at issue in docket number 240233.

III

Docket No. 242022

In docket number 242022, defendants appeal the trial court's refusal to award them case evaluation sanctions under MCR 2.403. The trial court did not articulate any grounds in support of its ruling, but instead made a conclusory determination that the "interests of justice" exception of MCR 2.403(O)(11) applied. "A trial court's decision to award case evaluation sanctions involves a question of law that is reviewed de novo." *Elia v Hazen*, 242 Mich App 374, 376-

377; 619 NW2d 1 (2000). However, the trial court's decision to apply the interest of justice exception of MCR 2.403(O)(11) is subject to an abuse of discretion standard. *Campbell v Sullins*, 257 Mich App 179, 205, n 9; 667 NW2d 887 (2003).

In the present case, it is clear that defendants would have been entitled to case evaluation sanctions under MCR 2.403(O) but for the trial court's application of the interest of justice exception of MCR 2.403(O)(11). This Court has addressed some of the considerations of the interest of justice exception in *Luidens v 63rd District Court*, 219 Mich App 24; 555 NW2d 709 (1996).[5] There, we recognized that interest of justice was intended to be an exception to the general rule assessing fees and costs. *Id.* at 32. Further, this exception is to be applied only in *unusual* circumstances. *Id.* The *Luidens* Court identified two factors that fit within the exception: offers made for gamesmanship (as opposed to sincere attempts to settle) and cases involving legal issues of first impression involving issues of public interest. *Id.* at 35. Additionally, this Court has applied the interest of justice exception where the nature of the law is unsettled. *Stitt v Holland Abundant Life Fellowship (On Remand)*, 243 Mich App 461, 473; 624 NW2d 427 (2000). The *Luidens* Court, *supra* at 36, noted that "the common thread in these examples is that there is a public interest in having an issue judicially decided rather than merely settled by the parties."

Here, the trial court gave no explanation for applying the interests of justice exception of MCR 2.403(O)(11). Moreover, plaintiff has failed to argue grounds that would trigger the exception under the facts of the instant case. Under these circumstances, we conclude that the lower court abused its discretion in refusing to award case evaluation sanctions. Accordingly, we remand this case to the trial court to calculate and award reasonable attorney fees under MCR 2.403.

Affirmed in Docket No. 240233; reversed and remanded in Docket No. 242022. We do not retain jurisdiction.

/s/ Donald S. Owens
/s/ Richard Allen Griffin
/s/ Bill Schuette

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[5] *Luidens* involved an application of MCR 2.405, which involves offers of settlement. However, the language involved in the interests of justice exception of MCR 2.405 is the same as the language in MCR 2.403.